Supreme Court of the United States.

No. 98.—October Term, 1904.

Charles P. Cook et al., Plaintiffs in Error, vs. The County of Marshall, Iowa. } In error to the Supreme Court of the State of Iowa.

[January 16, 1905.]

This was a petition by the owner and tenant of a certain room in the city of Marshalltown, Iowa, addressed to the board of supervisors, for the remission of a tax of $300, imposed upon the business of selling cigarettes, which business was carried on by Charles P. Cook, one of the plaintiffs in error. The petition being denied, an appeal was taken to the District Court, where a demurrer was interposed, which was sustained by that court, and an appeal taken to the Supreme Court, where the judgment of the District Court was affirmed. (119 Iowa, 384.)

Mr. Justice Brown delivered the opinion of the Court..

This case involves the constitutionality of section 5007 of the Iowa Code, imposing a tax of $300 per annum upon every person, and also upon the real property and the owner thereof, whereon cigarettes are sold or kept for sale. The section is printed in full in the margin.*

The facts of the case were that the plaintiff, Charles P. Cook, carried on a retail cigar and tobacco store upon premises leased by him from his co-plaintiff. Cook ordered his cigarettes of the American Tobacco Company, at St. Louis. They were delivered to an express company, and brought by such company from St. Louis, or other places outside of the State of Iowa,

* Sec. 5007. Tax on sale.—There shall be assessed a tax of three hundred dollars per annum against every person, partnership or corporation, and upon the real property, and the owner thereof, within or whereon any cigarettes, cigarettes wrapper, or any paper made or prepared for the use in making cigarettes, or for the purpose of being filled with tobacco for smoking, are sold or given way, or kept with the intent to be sold, bartered or given away, under any pretext whatever. Such tax shall be in addition to all other taxes and penalties, shall be assessed, collected and distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon all property, both personal and real, used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes, or cigarettes paper or selling, bartering or giving away the same. But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside of the State.

directly to the place of business of the plaintiff, in small pasteboard boxes, containing ten cigarettes each, each package being sealed and stamped with the revenue stamp. These packages were shipped absolutely loose, and were not boxed, baled, wrapped or covered, nor were they in any way attached together. Nothing appears in the record to indicate the means used in transporting these cigarettes from the factory of the manufacturer to the place of business of the retail dealer, and we are left to infer that they were shoveled into and out of a car, and delivered to plaintiffs in that condition. The packages were not separately or otherwise addressed, but at the time they were delivered to the express company the driver gave a receipt showing the number of packages and the name of the person to whom they were to be sent, retaining a duplicate himself.

The constitutionality of the act as applied to the plaintiffs was attacked upon two grounds:

(1) That it was an attempt to interfere with the power of Congress to regulate commerce between the States.

(2) That it denied to the plaintiffs the equal protection of the laws.

The argument of the plaintiffs is the same as that which was pressed upon our attention a few years ago in *Austin* v. *Tennessee*, (179 U. S. 343,) that the packages of ten cigarettes were each the original packages in which these cigarettes were imported from other States, and that under the decisions of this court in *Brown* v. *Maryland*, (12 Wheat. 419;) *Leisy* v. *Hardin* (135 U. S. 100) and *Shollenberger* v. *Pennsylvania*, (171 U. S. 1.) they were entitled to the immunities attaching to original packages. We reviewed these and a large number of other cases in our opinion, and came to the conclusion that these boxes were in no just sense original packages within the spirit of the prior cases, and that their shipment in this form was not a *bona fide* transaction, but was merely a convenient subterfuge for evading the law forbidding the sale of cigarettes within the State. This case differs from that only in the fact that in the Austin case the packages were thrown loosely into baskets, which were shipped on board the train and carried to Austin's place of business. These baskets, it is argued, might have been considered as the original packages.

This difference, however, was not insisted upon as distinguishing the two cases in principle. Indeed it was admitted to be one not of "great magnitude or seeming legal significance." The main argument of the plaintiffs was frankly addressed to a reconsideration of the principle involved in the Austin case, and a reinsistence upon the position there taken, that the packages in which the cigarettes were actually shipped must govern, and that we cannot look to the motives which actuated such shipment, or to the fact that ordinary importations of cigarettes were made in boxes containing a large number of these so-called original packages. We have carefully reconsidered the principle of that case, and, without re-

peating the arguments then used in the opinions, we have seen no reason to reverse or change the views there expressed.

The term original package is not defined by any statute, and is simply a convenient form of expression adopted by Chief Justice Marshall in *Brown* v. *Maryland*, to indicate that a license tax could not be exacted of an importer of goods from a foreign country who disposes of such goods in the form in which they were imported. It is not denied that in the changed and changing conditions of commerce between the States, packages in which shipments may be made from one State to another may be smaller than those "bales, hogsheads, barrels or tierces," to which the the term was originally applied by Chief Justice Marshall, but whatever the form or size employed there must be a recognition of the fact that the transaction is a *bona fide* one, and that the usual methods of interstate shipment have not been departed from for the purpose of evading the police laws of the States.

In *Leisy* v. *Hardin*, (135 U. S. 100,) quarter barrels, and even one-eighth barrels and cases of beer, were recognized as original packages or kegs, though the size of such packages and the usual methods of transporting beer do not seem to have been made the subject of discussion. There is nothing in the opinion to indicate that it was not legitimate to ship beer in kegs of this size. So, too, in *Shollenberger* v. *Pennsylvania*, oleomargarine transported and sold in packages of ten pounds weight was recognized as *bona fide*, but it was expressly found by the jury in that case that the package was an original package, as required by the act of Congress, and was of such "form, size and weight as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce, and the said form, size and weight were adopted in good faith, and not for the purpose of evading the laws of the Commonwealth of Pennsylvania, said package being one of a number of similar packages forming one consignment, shipped by the said company to the said defendant." While it may be impossible to define the size or shape of an original package, the principle upon which the doctrine is founded would not justify us in holding that any package which could not be commercially transported from one State to another as a separate importation could be considered as an original package.

But it is insisted with much earnestness that in determining the lawfulness of sales in original packages we are bound to consider that package as original in which the articles were actually shipped, particularly where Congress, for the purposes of taxation, has prescribed a certain size of package to be separately stamped, and that we have no right to look beyond the letter of the term and inquire into the motives which dictated the size of the packages in each case. This argument was also made in

the Austin case, was considered at some length, and held to be unsound. In delivering the opinion we said, (p. 359): "The real question in this case is whether the size of the package in which the importation is actually made is to govern, or the size of the package in which *bona fide* transactions are carried on between the manufacturer and the wholesale dealer residing in different States. We hold to the latter view. The whole theory of the exemption of the original package from the operation of State laws is based upon the idea that the property is imported in the ordinary form in which, from time immemorial, foreign goods have been brought into the country."

While it is doubtless true that a perfectly lawful act may not be impugned by the fact that the person doing the act was impelled thereto by a bad motive, yet where the lawfulness or unlawfulness of the act is made an issue the intent of the actor may have a material bearing in characterizing the transaction. We have had frequent occasions to treat of this subject in passing upon the validity of legislative acts or municipal ordinances. So where the lawfulness of the method used for transporting goods from one State to another is questioned, it may be shown that the intent of the party concerned was not to select the usual and ordinary method of transportation, but an unusual and more expensive one, for the express purpose of evading or defying the police laws of the State. If the natural result of such method be to render inoperative laws intended for the protection of the people, it is pertinent to inquire whether the act was not done for that purpose, and to hold that the interstate commerce clause of the Constitution is invoked as a cover for fraudulent dealing, and is no defence to a prosecution under the State law.

The power of Congress to regulate commerce among the States is perhaps the most benign gift of the Constitution. Indeed it may be said that without it the Constitution would not have been adopted. One of the chief evils of the confederation was the power exercised by the commercial States of exacting duties upon the importation of goods destined for the interior of the country or for other States. The vast territory to the west of the Alleghanies had not yet been developed or subdivided into States, but the evil had already become so flagrant that it threatened an utter dissolution of the confederacy. The article was adopted that all of States of the Union might have the benefit of the duties collected at the maritime ports, and to relieve them from the embarrassing restrictions imposed upon the internal commerce of the country. But the same policy which authorizes the use of this power as a shield to protect commerce from the vexatious interference of the States forbids its employment as a sword to assail measures designed for the preservation of the public health, morals, and comfort. States may differ among themselves as to the necessity and scope of such measures, but so long as they are adopted

in good faith, with an eye single to the public welfare, they are as much entitled to the recognition of the General Government as if they were uniformly adopted by all the States.

While this court has been alert to protect the rights of non-resident citizens and has felt it its duty, not always with the approbation of the State courts, to declare the invalidity of laws throwing obstacles in the way of free intercommunication between the States, it will not lend its sanction to those who deliberately [illegible] to debauch the public conscience and trample upon the laws of a State. The power of Congress to regulate commerce is undoubtedly a beneficent one. The police laws of the State are equally so, and it is our duty to harmonize them. Undoubtedly a law may sometimes be successfully and legally avoided if not evaded, but it behooves one who stakes his case upon the letter of the Constitution not to be wholly oblivious of its spirit. In this case we cannot hold that plaintiffs are entitled to its immunities without striking a serious blow at the rights of the States to administer their own internal affairs.

2. The argument that section 5007 of the Iowa Code denies to the plaintiffs the equal protection of the laws is based upon an alleged discrimination arising from the final sentence that "the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside of the State."

We are referred in this connection to a series of well-known cases arising under the anti-trust laws of the several States, to the effect that laws against combinations in trade must be uniform in their application as applied to all persons within the same general class. The leading case upon this point is *Connolly* v. *Union Sewer Pipe Company*, (184 U. S. 540,) where a law of Illinois against combinations to regulate prices and productions, and create restrictions, was held to be invalid by reason of the exemption of agricultural productions or live stock while in the hands of the producer or raiser.

A similar case is that of *Cotting* v. *Stock Yards Company*, (183 U. S. 79,) wherein a statute of Kansas regulating the prices to be paid for the use of public cattle stock yards was held invalid by reason of the fact that it was intended to apply only to the stock yards of Kansas City, and not to other companies or corporations engaged in like business in other portions of the State.

These cases, however, have but limited application to laws imposing taxes, where the right of classification is held to permit of discrimination between different trades and callings when not obviously exercised in a spirit of prejudice or favoritism. (*Kentucky Railroad Tax Cases*, 115 U. S. 321; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *American*

Sugar Refining Company v. *Louisiana*, 179 U. S. 89; *Bell's Gap Railroad Company* v. *Pennsylvania*, 134 U. S. 232.)

This distinction was recognized by Mr. Justice Harlan in *Connolly* v. *Union Sewer Pipe Company*, on page 562, wherein it is said "a State may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States." It can scarcely be doubted that, if the Connolly case had dealt with the subject of taxation, a discriminative tax upon producers of agricultural products, either greater or less than that imposed upon other manufacturers or producers, might have been held valid without denying to either party the equal protection of the laws. The holding in that case was simply that, considering that the object of the statute was to prevent combinations of capital or skill for certain purposes, the exemption of farmers was based upon no sound distinction, and rendered the law invalid as to other classes included within it.

There is a clear distinction in principle between persons engaged in selling cigarettes generally or at retail, and those engaged in selling by wholesale to customers without the State. They are two entirely distinct occupations. One sells at retail, the other at wholesale; one to the public generally, and the other to a particular class; one within the State, the other without. From time out of mind it has been the custom of Congress to impose a special license tax upon wholesale dealers different from that imposed upon retail dealers. A like distinction is observed between brewers and rectifiers, wholesale and retail dealers in leaf tobacco and liquors, manufacturers of tobacco and manufacturers of cigars, as well as peddlers of tobacco. It may be difficult to distinguish these several classes in principle, but the power of Congress to make this discrimination has not, we believe, been questioned.

Why the legislature should have made the distinction found in section 5007 is not entirely clear, but it probably arose from the belief that the imposition of a license tax upon wholesale exporters of cigarettes would be as much an interference with interstate commerce as the imposition of a similar tax upon importers from abroad was held to be in *Brown* v. *Maryland*. We are satisfied the section is not open to the objection of denying to the dealers in cigarettes the equal protection of the laws.

The judgment of the Supreme Court is, therefore,

Affirmed.

Mr. Justice WHITE, concurring:

The only difference between this and the Austin case is that in this no basket was used to hold the many small packages shipped at one and the

same time to the same person. In my opinion, such fact is not sufficient to take the case out of the reach of the reasoning stated by me for concurring in the decree in the Austin case. For the reasons given for my concurrence in that case I concur in the judgment rendered in this.

The CHIEF JUSTICE, Mr. Justice BREWER and Mr. Justice PECKHAM dissented.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 150.—October Term, 1904.

Robert E. Hodge et al., Plaintiffs in Error, vs. Muscatine County et al. } In error to the Supreme Court of the State of Iowa.

[January 16, 1905.]

This was a petition in the District Court by the owner and tenant of certain real estate in Muscatine, used for a tobacconist's shop, to enjoin the defendants from assessing and collecting a tax of $240, upon the ground of the unconstitutionality of the law.

Demurrers were interposed to the petition and to certain amendments thereto, which were sustained, the bill dismissed, and an appeal taken to the Supreme Court of Iowa, which affirmed the judgment of the court below. (121 Iowa, 482.)

Mr. Justice Brown delivered the opinion of the Court.

This case involves the same questions as those just disposed of in *Cook* v. *Marshall County*, and in addition thereto the point is made that the laws of Iowa deny to the owner of property leased for the sale of cigarettes due process of law.

To answer satisfactorily the question thus presented, it is necessary to consider the laws of Iowa respecting the tax upon cigarette dealers, and the methods of enforcing the same.

By section 5006 a fine and imprisonment are imposed for selling cigarettes.

By section 5007, printed in full in the Marshall County case, a tax of $300 per annum is assessed "against every person . . . and upon the real property and the owner thereof," whereon cigarettes, etc., are sold, or kept with intent to be sold, with a provision that "such tax shall be in addition to all other taxes and penalties, shall be assessed, collected, and distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon all property, both personal and real, used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting" the selling of cigarettes.

This assessment is made collectible as is a similar charge made upon dealers in liquor as follows:

By section 2433 the assessor makes quarterly returns to the auditor of the persons liable to the tax, and a description of the real property whereon the business has been carried.

By section 2436 the charge is made payable in quarterly installments, and shall be a lien upon the real property.

By section 2437 the auditor certifies quarterly to the county treasurer a list of the names returned to him by the assessor, with a description of the names of the tenant and owner.

By section 2438 the county treasurer enters upon the mulct tax book a quarterly installment of the tax as a lien and charge upon the real property.

By section 2439, if the tax is not paid within a month, it shall be considered delinquent and be collectible as other delinquent taxes.

By section 2440 the treasurer may collect the same after it has become delinquent, by seizing and selling any personal property.

By section 2441 application may be made to the board of supervisors to remit the tax by petition duly verified and filed with the county auditor eight days before the time set for the consideration of the case, notice of which must be served upon the county attorney.

By section 2442 the owner of the property may be heard in support of his application. A majority of the board determines whether the tax shall stand or be remitted, and either party may take an appeal to the District Court.

These are all of the provisions of the law material to be considered.

We do not deem it necessary to affix a definition to the charge imposed by section 5007. It is certainly not an ordinary license tax, as the payment of such tax is no bar to a prosecution for selling cigarettes under section 5006. In *Smith* v. *Skow*, (97 Iowa, 640,) it is said, in speaking of the mulct liquor tax, to which this is analogous, that though called a tax in the statute, it is not in fact a tax as we usually use the word. "It is in reality a charge or license for carrying on the business of vending liquors, which charge is made a lien upon all property used or connected with the business." In *Ferry* v. *Deneen*, (82 N. W. Rep. 424,) it is observed by the same court, "it is apparent, taking all the provisions of this act together, that the amount imposed, while called a 'tax,' is at the same time a penalty."

But in the opinion of the court in the case under consideration, the charge imposed by section 5006 is said to be "clearly not a license, for it does not grant permission to do an act, which without such permission would be invalid, . . . that it is manifestly a tax upon the traffic which the legislature saw fit to impose, not for the purpose of giving countenance to the business but as a deterrent against engaging therein. . . . Indeed, we think it may fairly be said to be a tax upon the business. That a tax is imposed for the double purpose of regulation and revenue is no reason for declaring it invalid. Being a tax, it was competent for the legislature to prescribe the proceedings and processes for its collection."

This being the latest expression of opinion of the Supreme Court of Iowa, we accept it for the purposes of this case. If it be not a construction binding upon us, it is, at least a construction which we ought to follow, unless we are clearly of opinion that it is wrong.

In the case of *McBride* v. *The State* (70 Miss. 716,) cited by plaintiffs, it was held that a statute providing that a person selling liquor unlawfully should be subject to pay, "where the offence is committed," the sum of $500, and should also be liable to a "criminal prosecution," imposed a penalty and not a tax, and that a proceeding to collect such penalty by distress was unconstitutional; but a distinction was drawn in that case between a penalty and a tax, and it was intimated that a proceeding by distress to collect a tax would not be open to a like objection.

It is not easy to draw an exact line of demarkation between a tax and a penalty, but in view of the fact that the statute denominates the assessment a "tax," and provides proceedings appropriate for the collection of a tax, but not for the enforcement of a penalty, and does not contemplate a criminal prosecution, we cannot go far afield in treating it as a tax rather than a penalty. Section 5006 does indeed impose a penalty, but section 5007 imposes a tax, with an additional provision that the payment of the tax shall not absolve the party from the penalty. It would be a distortion of the words employed to speak of section 5007 as imposing an additional penalty. The act itself provides in terms that such tax shall be an addition to all other taxes *and penalties*, and elaborate provision is made for its enforcement. The mere fact that the charge, whatever it may be, is made a lien upon the real estate and a personal claim against the landlord indicates that it is the nature of a tax rather than a penalty.

There is no conflict between the two sections, the State reserving to itself an election to proceed under the one or the other. If Congress may provide that a license granted by it to sell liquors shall not be construed to authorize the sale of such liquors when prohibited by the laws of the State, as was held by this court in *McGuire* v. *Commonwealth*, (3 Wall. 387; (*The License Tax Cases*, (5 Wall. 463;) *Commonwealth* v. *Crane*, (158 Mass. 218;) *Pervear* v. *Commonwealth*, (5 Wall. 475,) we see no reason why the State itself may not exercise the same power and reserve to itself the right to tax or prohibit, as in individual cases it may see fit.

2. Coming now to the provisions for its enforcement, it is entirely clear that, as to the person actually carrying on the business, no notice of the assessment or levy of the tax is necessary. If the person carries on the business, the imposition of the tax follows as a matter of course. There is no discretion as to the amount. (*McMillen* v. *Anderson*, 95 U. S. 37; *Hager* v. *Reclamation District*, 111 U. S. 701; *Turpin* v. *Lemon*, 187 U. S. 51; *In re Smith*, 104 Iowa, 199.)

It was within the power of the legislature to make the tax a lien upon the property whereon the business was carried. If general taxes upon real estate and specific taxes for improvements thereto, including pavements, sidewalks, sewers, the opening of streets and keeping them clean, may be made liens upon the property affected, it is difficult to see why a tax upon the business carried on upon such property may not be made a lien as well as a claim against the owner. The owner is not only chargeable with a knowledge of the law in respect thereto, but he is presumed to know the business there carried on, and to have let the property with knowledge that it might become encumbered by a tax imposed upon such business. (*Sheldon* v. *Van Buskirk*, 2 N. Y. 473; *Brown Shoe Co.* v. *Hunt*, 103 Iowa, 586; *Polk Co.* v. *Hierb*, 37 Iowa, 367; *State* v. *Snyder*, 34 Kan. 425; *Hardten* v. *State*, 32 Kan. 637; *Sears* v. *Cottrell*, 5 Mich. 251; *Walderon et al.* v. *Lee*, 5 Pick. 323; *Spencer* v. *McGowen & Shepard*, 13 Wend. 256; *Simpson* v. *Serviss*, 2 Ohio Circuit Decisions, 246.)

Acts of Congress impressing liens upon real estate for taxes or penalties arising from business illegally carried on there, have been the frequent subject of controversy in this court.

Conceding that the landowner is entitled to notice before he can be personally liable, or before his property can be impressed with a lien, we are of opinion that he is protected by sections 2441 and 2442, which permits him to make application at the meeting of the board of supervisors next following the listing of the property, the sessions of which board are fixed by law, (Iowa Code, sec. 412,) to remit the tax. This application may be made at any time after the property has been assessed, upon eight days' notice being given to the county attorney. Witnesses are examined under oath before the board, which determines by a majority vote whether the tax shall stand or be remitted. If the petition be denied, the owner of the property can appeal to the District Court for a judicial determination of his liability. This is sufficient. If the taxpayer be given an opportunity to test the validity of the tax at any time before it is made final, whether the proceedings for review take place before a board having a *quasi* judicial character, or before a tribunal provided by the State for the purpose of determining such questions, due process of law is not denied. It was held by this court in *Pittsburg &c. R. R. Co.* v. *Backus*, (154 U. S. 421, 426,) that a hearing before judgment, with full opportunity to present the evidence and the arguments which the party deems important, is all that can be adjudged vital. See also *King* v. *Mullins*, (171 U. S. 404.)

In the amendment to the petition in this case the landowner states that she had no knowledge whatever that her real estate was being used for the sale of cigarettes until after the assessment was levied, and never consented to the same; that she resides in Illinois, and rented the property through an agent, who had had no knowledge himself of the sale of

cigarettes upon the premises. There is no allegation, however, that she did not have knowledge within ample time to make application to the board of supervisors for the remission of the tax. If such application had been made, it would have been the duty of the board to take the matter into consideration and determine whether her want of knowledge would justify the remission of the tax. It is not for us to determine whether the defense be a valid one, since, having the opportunity to make it, she declined to do so.

The question is made whether section 5007 violates the Constitution of Iowa in not stating distinctly the tax and the object to which it is to be applied, but as this is purely a local question, we are not called upon to consider it.

Affirmed.

The CHIEF JUSTICE, Mr. Justice BREWER and Mr. Justice PECKHAM dissented.

True copy.

Test:

Clerk Supreme Court, U. S.